APPEAL NO. 030811
FILED MAY 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 11, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the eighth (October 17, 2002 to January 15, 2003) and ninth (January 16 to April 16, 2003) quarters. The appellant/cross-respondent (carrier) appeals, arguing that the hearing officer's determinations are against the great weight and preponderance of the credible evidence and that the hearing officer failed to strictly construe Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) and erred in failing to find that at least one record showed an ability to work. The carrier additionally argued that the hearing officer made specific findings that the claimant had some ability to work. The claimant responded, urging affirmance. The claimant filed a cross-appeal, requesting correction of typographical errors.

DECISION

Affirmed as reformed.

Initially, we consider the new evidence attached to the carrier's appeal, which was not admitted in evidence at the hearing. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Acknowledging that the doctor's report was created in close proximity to the date of the hearing and the carrier's contention that it did not receive the report until after the CCH, we cannot agree that the evidence meets the requirements of newly discovered evidence in that the carrier did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing. The document purports to be an opinion, from a designated doctor regarding whether or not the claimant's medical condition has improved sufficiently to allow him to return to work. The carrier could have sought a copy of that opinion earlier and it did not demonstrate any efforts to do so. Accordingly, the evidence does not meet the standard for newly discovered evidence and it will not be considered on appeal.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Rule 130.102. The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the eighth and ninth quarters. The parties stipulated that the qualifying period for the eighth quarter began on July 5, 2002, and ended on October 3, 2002; and that the qualifying period for the ninth quarter began on October 4, 2002, and ended on January 2, 2003. The claimant contended that he had no ability to work during those qualifying periods. The claimant did not work or look for work during the qualifying periods. Rule

130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts.

The carrier argues that there were records in evidence that showed on their face that the claimant had an ability to work. In Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002, citing Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000, the Appeals Panel stated that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record." In the instant case, the hearing officer noted that while the functional capacity evaluation (FCE) and the report from the required medical examination doctor which was based on the FCE "purport to show that claimant could work at the sedentary physical demand level, the results do not bear out that conclusion."

The carrier additionally argues that the narrative from the claimant's treating doctor shows on its face that the claimant had an ability to work. However, the hearing officer was persuaded that the reports of the claimant's treating doctor showed that the claimant was unable to perform any type of work in any capacity and specifically explained how the injury caused a total inability to work.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no grounds to reverse the challenged findings of the hearing officer.

The claimant contends that the hearing officer made a typographical error in Findings of Fact Nos. 2.B. and 3.B. by stating that the claimant had some ability to work, and asserts that the hearing officer meant to find that claimant had no ability to work. The carrier argues that these findings necessitate reversal. Based on the hearing

officer's Statement of the Evidence, Findings of Fact Nos. 2.C. and 3.C. and Conclusions of Law No. 3 and 4, that the claimant is entitled to SIBs for the eighth and ninth quarters we agree that Findings of Fact Nos. 2.B. and 3.B. contain typographical errors. We hereby reform Finding of Fact No. 2.B. to substitute "no ability to work" for "some ability to work." We reform Finding of Fact No. 3.B. to substitute "no ability to work" for "some ability to work." We additionally reform the decision to read: "Claimant is entitled to supplemental income benefits for the 8th and 9th quarters," rather than "Claimant is entitled to supplemental income benefits for the 8th or 9th quarters."

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Edward Vilano
Appeals Judge